

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL BOBOWSKI, ALYSON BURN,
STEVEN COCKAYNE, BRIAN CRAWFORD,
DAN DAZELL, ANGELO DENNINGS,
CHEYENNE FEGAN, SHARON FLOYD,
GREGORY GUERRIER, JOHANNA
KOSKINEN, ELENA MUNOZ-ALAZAZI,
ELAINE POWELL, ROBERT PRIOR, ALIA
TSANG, and KYLE WILLIAMS, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

CLEARWIRE CORPORATION,

Defendant.

Case No. C10-1859-JLR

**PLAINTIFFS' REPLY IN SUPPORT
OF MOTION FOR APPEAL BOND**

NOTE ON MOTION CALENDAR:
Friday, March 8, 2013

A. The Three Factors Favor Requiring a Bond

Objectors' counsel is an extraordinarily prolific applier of class settlements. In the Ninth Circuit alone, at present he is representing class-action objectors in 11 pending appeals; and he represented objectors in 16 more Ninth Circuit appeals that recently concluded. *See* Tycko Decl. ¶¶ 2-4 & Ex. A.

In a civil case, the district court may require the posting of an appeal bond in "an amount necessary to ensure payment of costs on appeal." Fed. R. App. P. 7. The decision of whether to require a bond is subject to a well-established three-factor test. *See* Mot. at 2:27 - 3:9 (dkt. 107) (describing 3-factor test).

Objectors Mr. Morgan and Mr. De La Garza make no arguments opposing the three factors that courts use to determine whether to impose an appeal bond under Rule 7. Therefore, the question for the Court is not "whether" but simply "how much."

B. Bondable Costs Are Not Limited by FRAP 39

Objectors argue incorrectly that "costs referred to in Rule 7 are simply those that may be taxed against an unsuccessful litigant under Federal Appellate Rule 39 ..." Opp. at 2:9-11 (original brackets and citation omitted). The Ninth Circuit holds otherwise: "We read this language to mean that the costs identified in Rule 39(e) are *among*, but not necessarily the *only*, costs available on appeal." *Azizian v. Federated Department Stores, Inc.*, 499 F.3d 950, 958 (9th Cir. 2007) (emphasis added).

C. There Is No Request for a Supersedeas Bond

Plaintiffs (joined by defendant Clearwire Corporation) seek a reasonable appeal bond under Rule 7 of the Federal Rules of Appellate Procedure. They did not move for a supersedeas bond, and all of Objectors' arguments about supersedeas bonds are off the mark.

D. Courts Commonly Include Increased Administrative Costs in Appeal Bonds

District courts in the Ninth Circuit and around the country recently and commonly have included incrementally increased administrative costs in Rule 7 appeal bonds. As examples, plaintiffs cited *Miletak v. Allstate Ins. Co.*, No. 06-3778, 2012 WL 3686785, *2 (N.D. Cal. Aug.

27, 2012) (finding “good cause” supported including \$50,000 in “administrative costs” incurred in order “to continue to service and respond to class members’ needs pending the appeal”) and *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, No. 11-2247, 2012 WL 3984542, **4-5 (D. Minn. Sep. 11, 2012) (“the parties expect the claims administrator to charge an extra \$20,000 for additional administrative functions during the delay”; as a result, the court included that \$20,000 as part of appeal bond because such costs are “reasonable and necessary” and “should be shouldered by the Objectors, particularly given the tenuous nature of their arguments”). Mot. at 8:14-22 (dkt. 107).

Other examples include *Heekin v. Anthem, Inc.*, No. 05-1908, 2013 WL 752637, **1-2 (S.D. Ind. Feb. 27, 2013) (“In class action cases, ... bonds are used to cover excess administrative costs that otherwise would not have been incurred. ... The Court concludes that in this case, like those cited above, the excess administrative costs created by the delay incident to the appeal, can be characterized as a ‘cost of appeal’ under Rule 7”); *In re Nutella Marketing and Sales Practices*, No. 11-1086, 2012 WL 6013276, **2-3 (D.N.J. Nov. 20, 2012) (“I therefore conclude that administrative costs can be secured by a Rule 7 bond.” These include “expenses related to the settlement website, and fees and expenses incurred by Rust Consulting, Inc., the administrator for the settlement.”).

In yet another recent example involving Mr. Bandas himself, plaintiffs moved for an appeal bond that included \$55,650 of the same sort of settlement-administrator charges at issue here. *Embry v. ACER Am. Corp.*, No. 09-1808, (i) Motion for Appeal Bond at 5:19, 9:20, 17:4-12 (N.D. Cal. Mar. 23, 2012) (dkt. 232) and (ii) Declaration of Amy L. Lake Regarding Additional Claims Administration Costs Resulting from Appeal at 2:15-22 & 3:1-16 (N.D. Cal. Mar. 23, 2012) (dkt. 232-2). See Second Cantor Decl. Exs. E & F, filed herewith.

The ACER court awarded the appeal bond against Mr. Bandas, specifically including the \$55,650 for “maintaining contact with class members for the duration of an appeal” and “\$15,000 in costs associated with preparing the record for appeal.” See *Embry v. ACER Am.*

1 *Corp.*, No. 09-1808, slip op. at 4 & n.12 (N.D. Cal. Jul. 31, 2012), previously submitted as
 2 Cantor Decl. Ex. B (dkt. 108-2).¹

3 In short, courts commonly award appeal bonds that include settlement administrators'
 4 expected additional charges.

5 **E. \$2,000 for FRAP 39 Costs Is Reasonable**

6 Finally, Objectors challenge the \$2,000 figure for traditional Rule 39 costs, identifying
 7 copying at 10¢ per page as the only legitimate cost. Opp. at page 5 of 8 [unnumbered] at line 15-
 8 24. But other costs include “the preparation and transmission of the record” and “the reporter’s
 9 transcript, if needed ...” Fed. R. App. P. 39. Courts also allow “printing, binding, filing, and
 10 service” costs. *See* Mot. at 7:18-22. The \$2,000 figure is reasonable—and is even more
 11 reasonable given that plaintiffs and defendant are separate appellees who will have to file
 12 separate appellate papers presenting their respective points of view.

13 **F. Conclusion**

14 Plaintiffs respectfully request that this Court require Mr. Morgan and Mr. De La Garza,
 15 jointly and severally, to either post an appeal bond of \$41,150 or file a notice of dismissal of
 16 their appeal.

17 Dated Mar. 8, 2013

Respectfully submitted,

18 By: s/ Cliff Cantor

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23 _____
 24 ¹ The *Embry* court excluded “delay damages,” or interest costs, from the bond amount.
 25 *Embry v. Acer Am. Corp.*, No. 09-1808, 2012 WL 2055030, *2 (N.D. Cal. Jun. 5, 2012). Though
 26 other district courts have included delay damages or interest expenses in Rule 7 appeal bonds,
 27 plaintiffs expressly did not seek that type of costs in their motion. Mot. at 10 (dkt. 107).

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Certificate of Service

I certify that, on Mar. 8, 2013, I caused the foregoing to be (i) filed with the clerk of the court via the CM/ECF system, which will send notification of filing to all counsel of record; and (ii) deposited in the U.S. mail, postage prepaid, addressed to Robert Prior, 2016 E. 6th St., Vancouver WA 98661.

s/ Cliff Cantor
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